United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7079

ORIGINAL

To be argued by
EDWARD J. ROSS

United States Court of Appeals
For the Second Circuit

HOWARD BERSCH,

Plaintiff-Appellee,

against

DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE ROTHSCHILD, HILL SAMUEL AND CO., LIMITED, GUINNESS MAHON & CO., LIMITED, PIERSON, HELDRING & PIERSON, SMITH, BARNEY & CO. INCORPORATED, J. H. CRANG AND CO., INVESTORS OVERSEAS BANK LIMITED, I.O.S., LTD., and BERNARD CORNFELD,

Defendants,

ARTHUR ANDERSEN & Co.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR DEFENDANT-APPELLANT ARTHUR ANDERSEN & CO.

BREED, ABBOTT & MORGAN
One Chase Manhattan Plaza
New York, New York 10005

EDWARD J. ROSS
JAMES D. ZIRIN
Of Counsel

WILSON & MCILVAINE
135 South LaSalle Street
Chicago, Illinois 60603

CHARLES W. BOAR
Of Counsel

Attorneys for Defendant-Appellant Arthur Andersen & Co.

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HOWARD BERSCH,

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Defendants,

and

ARTHUR ANDERSEN & Co. and BERNARD CORNFELD,

Defendants-Appellants.

CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE SETTLING DEFENDANTS

Defendants Arthur Andersen & Co. ("Andersen") and Bernard Cornfeld ("Cornfeld") have appealed from an order of the United States District Court for the Southern District of New York, Honorable Robert L. Carter, U.S.D.J., dated December 4, 1974, which directed the giving of notice of a hearing on a Stipulation of Settlement dated June 28, 1974 between plaintiff and six of the defendants in this action

(hereinafter the "Settling Defendants").* This brief is submitted on behalf of the Settling Defendants in response to certain of the arguments advanced in the briefs of Andersen and Cornfeld.

The basic argument of the Andersen and Cornfeld briefs is that the District Court's December 4, 1974 order represented a class action determination which is appealable as of right and which should be reversed or modified by this Court. The Settling Defendants take no position with respect to this argument on this appeal.

However, the briefs filed by Andersen and Cornfeld also attack the merits of the Stipulation of Settlement between plaintiff and the Settling Defendants, arguing that the proposed settlement is unethical and against public policy. The Settling Defendants strongly oppose these wholly unwarranted attacks upon the proposed settlement.**

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* The six Settling Defendants are Lexerd & Co., Inc. (formerly known as Drexel Firestone, Inc. and Drexel Harriman Ripley), Banque Rothschild, Hill Samuel & Co., Limited, Guinness Mahon & Co., Limited, Pierson, Heldring & Pierson, and Smith, Barney & Co. Incorporated.

** It should be noted at the outset that Andersen's and Cornfeld's attacks on the proposed settlement are not properly before this Court. The notices of appeal filed by Andersen and Cornfeld stated in identical language that they were appealing "from that part of the Order entered in this action on the fourth day of December, 1974, which in effect ordered that this action may be maintained as a class action . . ." Having so limited their appeals, Andersen and Cornfeld may not now expand them to include the merits of the proposed settlement. *See, e.g., Terkildsen* v. *Waters,* 481 F.2d 201, 205-06 (2d Cir. 1973); *Benenson* v. *United States,* 385 F.2d 26, 29 (2d Cir. 1967); 9 J. W. Moore, Federal Practice ¶ 203.18, at 756 (2d ed. J. W. Moore & B. J. Ward 1973).

Issues Presented

This brief is addressed to the following issues:

1. Do the Non-Settling Defendants have standing to object to a proposed settlement which affects no legal right of the Non-Settling Defendants?

2. Is the proposed settlement between plaintiff and the Settling Defendants subject to attack on the ground that it would furnish plaintiff with funds to defray the cost of notice to the class and other present and future costs of litigation against the Non-Settling Defendants?

3. Is the proposed settlement subject to attack on the ground that, in order to relieve the Settling Defendants of the burden and expense of further litigation, it contains provisions designed to indemnify the Settling Defendants against any claims which may be asserted by the Non-Settling Defendahts by way of indemnity, contribution, or otherwise?

4. Is the notice of the proposed settlement which was approved by the District Court inadequate because it is written in the English language?

Statement of the Case

The present action was commenced on December 9, 1971 (1A*). In addition to the Settling Defendants, who were the lead underwriters of one of the three offerings of common shares of I.O.S., Ltd. ("IOS") in September 1969, the defendants named in the complaint (5A-19A) were IOS

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* "A" citations are to the Appellants' Appendix in Docket No. 75-7038, whose use on this appeal was authorized by an order of this Court dated March 19, 1975.

itself; Bernard Cornfeld, who was the Chairman and Chief Executive Officer of IOS in September 1969; Arthur Andersen & Co., which certified the 1964-1968 financial statements used in all three of the September 1969 offerings (179A, 186A, 189A); J. H. Crang & Co. ("Crang"), the lead underwriter of another of the three September 1969 offerings; and Investors Overseas Bank Limited, which managed the third of the September 1969 offerings.

On June 28, 1972 the District Court, Honorable Marvin E. Frankel, U.S.D.J., rendered a memorandum opinion and order (81A-84A) which determined that the present action may be maintained as a class action on behalf of all purchasers of IOS common shares in the September 1969 offerings (84A).

Plaintiff then conducted discovery on the issues of subject matter and personal jurisdiction, which was completed on September 1, 1973 (85A-93A). Certain of the defendants thereupon filed motions to dismiss the complaint for lack of subject matter or personal jurisdiction, and all moved to vacate or modify Judge Frankel's class determination (94A-95A, 107A-112A, 150A-151A, 159A-161A, 192A-1-192A-4, 192A-64-192A-66).

On June 28, 1974, while these motions were pending before the District Court, plaintiff and the Settling Defendants entered into a Stipulation of Settlement (244A-251A). Under the Stipulation of Settlement the Settling Defendants agreed, subject to the approval of the Court, to establish a Settlement Fund of $700,000.00 which, after payment of plaintiff's attorney's fees and disbursements in amounts approved by the Court, would be held in an interest-bearing custodial account for ultimate distribution to the class as directed by the Court (246A). The Stipulation of Settlement reserved all rights of the plaintiff class against the Non-Settling

Defendants, except that, in order effectively to relieve the Settling Defendants of the burden and expense of further litigation, the Stipulation of Settlement provided that the class would release the Non-Settling Defendants from the claims of the class to the extent of any claims adjudicated in favor of the Non-Settling Defendants against the Settling Defendants by way of indemnity, contribution, or otherwise, and further provided that the class would indemnify the Settling Defendants, as a first charge upon any amount recovered by the class from the Non-Settling Defendants, for liabilities and expenses (including counsel fees) incurred by the Settling Defendants as a result of any claims asserted against them by the Non-Settling Defendants, and for expenses incurred in connection with furnishing evidence in this action (247A-249A).*

The proposed settlement was immediately presented to the District Court, Honorable Robert L. Carter, U.S.D.J., so that the Court might set the proposed settlement for a hearing upon notice to the class (254A). The Non-Settling Defendants argued that the Court should defer such notice until after the resolution of the issues of subject matter and personal jurisdiction (254A-255A). On November 26, 1974 Judge Carter filed an opinion (252A-280A) in which he upheld the Court's subject matter jurisdiction but granted Crang's motion to dismiss the complaint against it for lack of personal jurisdiction (280A).**

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* The Stipulation of Settlement also required that the Settling Defendants actively defend against the assertion of any such claims by the Non-Settling Defendants, and provided that such claims should not be compromised or settled without the prior written approval of the attorney for the plaintiff class (248A-249A).

** In light of the proposed settlement, Judge Carter did not pass upon any of the issues raised by the Settling Defendants other than the issue of subject matter jurisdiction (271A n.10).

On December 4, 1974 Judge Carter entered an order (283A-286A) setting the proposed settlement for a hearing on March 21, 1975. The December 4, 1974 order also approved a form of notice to the class concerning the proposed settlement (284A, 287A-295A), and directed the Settling Defendants (1) to mail the notice to persons who purchased IOS common shares from them in the September 1969 offering, (2) to request other underwriters and dealers which took part in the September 1969 offerings to do the same (with the cost of printing and postage to be borne by the Settling Defendants), and (3) to publish the notice in newspapers in New York, Paris, Montreal, and Toronto (285A). This is the order from which Andersen and Cornfeld have taken the present appeals.

Judge Carter certified his ruling on the issue of subject matter jurisdiction for immediate appeal pursuant to 28 U.S.C. § 1292(b) (281A-282A). This Court granted leave to appeal, and the appeals on the issue of subject matter jurisdiction, which were consolidated under Docket No. 75-7038 with plaintiff's appeal from the dismissal of the complaint against Crang, were argued before this Court (Circuit Judges Timbers and Mulligan and Senior Circuit Judge Friendly) on March 6, 1975. On December 19, 1974 the Court (Circuit Judge Timbers and Senior Circuit Judge Friendly) granted a stay of the mailing of notice pursuant to the December 4, 1974 order (299A), which was thereafter extended pending the hearing and determination of the appeals in Docket No. 75-7038.

ARGUMENT

POINT I

The Non-Settling Defendants Do Not Have Standing to Object to the Proposed Settlement.

The Non-Settling Defendants have fought the proposed settlement tooth and nail since it was first submitted to the District Court on June 28, 1974. They have sought in every way possible to delay or frustrate the proposed settlement, and even to prevent the plaintiff class from receiving any notice of the proposed settlement. But the simple fact is that the Non-Settling Defendants have no standing whatever to object to the proposed settlement.

The proposed settlement affects no legal right of the Non-Settling Defendants.* The Non-Settling Defendants' desire to keep the Settling Defendants in the case with them is a wholly understandable one, but it in no way rises to the level of a legal right to frustrate the consummation of a settlement between the plaintiff and the Settling Defendants. Quite bluntly, the proposed settlement is none of the Non-Settling Defendants' business.

In *Broadway & Ninety-Sixth Street Realty Corp.* v. *Loew's Inc.*, 23 F.R.D. 9, 11-12 (S.D.N.Y. 1958), Judge Dimock held that the non-settling defendants had no standing to object to a proposed settlement between the plaintiffs and certain of the defendants. In words which are equally applicable to the present case, Judge Dimock said:

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* The proposed settlement would release the Non-Settling Defendants from liability to the plaintiff class to the extent of any claims adjudicated in favor of the Non-Settling Defendants against the Settling Defendants by way of indemnity, contribution, or otherwise (*see* p. 5 *supra*), but the net effect of this provision upon the Non-Settling Defendants would be precisely the same as if no such provision had been included in the proposed settlement.

> "Doubtless the position of the objecting defendants would be more favorable with the moving defendants as co-parties with them but I can think of no reason in law or justice why the moving defendants, having bought their peace from plaintiffs, should be required to continue as co-parties with the objecting defendants and for their sole benefit.
>
> The joinder of the moving defendants by plaintiffs gave their fellow defendants no vested interest in the presence of the moving defendants as co-parties." 23 F.R.D. at 11.

This principle has been repeatedly followed. *See, e.g., Webb* v. *Beverly Hills Fed. Sav. & Loan Ass'n,* 364 F.2d 146, 149 (9th Cir. 1966); *Slotkin* v. *Brookdale Hospital Center,* 377 F. Supp. 275, 278 n.2 (S.D.N.Y. 1974); *Southern Elec. Generating Co.* v. *Allen Bradley Co.,* 30 F.R.D. 135, 136 (S.D.N.Y. 1962). It has been followed in class actions as well as in non-class actions. *See Wainwright* v. *Kraftco Corp.,* 53 F.R.D. 78, 81 (N.D. Ga. 1971); *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.,* 42 F.R.D. 324, 326 n.1 (E.D. Pa. 1967). Under this principle, the Non-Settling Defendants are without standing to attack the proposed settlement in the present case.

POINT II

It Is Wholly Proper for the Settling Defendants to Defray the Expenses of Giving Notice of the Proposed Settlement.

The December 4, 1974 order of the District Court directed the Settling Defendants to defray the expenses of giving notice to the class of the proposed settlement (285A). In Point III of its brief (Andersen Br. 17-21), Andersen argues

that this direction contravenes the holding of the Supreme Court in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 178-79 (1974), that the plaintiff in a class action must generally bear the initial cost of giving notice to the class. This argument is without merit.

Under Rule 23(e) of the Federal Rules of Civil Procedure, notice to the class of the proposed settlement is an indispensable prerequisite to any settlement in a class action brought under Rule 23(b)(3). Where, as in the present case, the settlement notice is the first notice to the class of the pendency of such an action, it must also contain the information specified in Rule 23(c)(2). The cost of the required notice of settlement may be charged to the settlement fund or may be paid directly by the settling defendants.*

In numerous cases following this Court's holding in *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555, 568 (2d Cir. 1968), 479 F.2d 1005, 1009 & n.5 (2d Cir. 1973), *aff'd on this issue,* 417 U.S. 156, 178-79 (1974), that the plaintiff must generally bear the initial cost of notice, this Court and other courts have approved settlement agreements under which the settling defendants or the settlement fund bore the cost of notice of the proposed settlement. *See, e.g., City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448, 454 (2d Cir. 1974); *State of West Virginia* v. *Chas. Pfizer & Co.,* 314 F. Supp. 710, 733 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U.S. 871 (1971); *Feder* v. *Harrington,* 58 F.R.D.

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* The end results of these two approaches are substantially equivalent, because if the cost of notice is to be charged to the settlement fund the fund can be increased by an amount equal to the anticipated cost of notice. Where the total cost of giving notice cannot be fixed definitively in advance, as in the present case, it is more practicable to provide that the cost of notice will be paid directly by the settling defendants.

171, 174 (S.D.N.Y. 1972). Indeed, the model orders under Rule 23(e) contained in Manual for Complex Litigation § 1.45 (1973) provide for payment of the expenses of giving notice by the defendants (subject to partial reimbursement from the settlement fund). Andersen's argument that this procedure is improper is not supported by any authority under Rule 23, and is wholly lacking in substance.

Unable to cite any authority upholding its position under Rule 23, Andersen charges that the agreement of the Settling Defendants to bear the cost of notice of the proposed settlement is "a champertous arrangement made in violation of law and contrary to public policy", as well as a violation of the Code of Professional Responsibility (Andersen Br. 17-18). These charges are completely without foundation. Any settlement involving less than all of the defendants in an action necessarily furnishes the plaintiff with additional financial resources to continue the action against the non-settling defendants. *See, e.g., Wainwright* v. *Kraftco Corp.*, 58 F.R.D. 9, 11-12 (N.D. Ga. 1973) (approving partial settlement to be used to reimburse named plaintiffs for accrued litigation expenses in class action). But it has never before been suggested that partial settlements should therefore be condemned as champertous, unethical, or contrary to public policy. On the contrary, the modern Federal rule that "a party releases only those other parties whom he intends to release" was adopted precisely because the Supreme Court concluded that the prior common law rule "would frustrate such partial settlements . . ." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 347 (1971).

Champerty is "an agreement whereby a person without interest in another's suit undertakes to carry it on at his own expense, in whole or in part, in consideration of receiv-

ing, in the event of success, a part of the proceeds of the litigation." *Welch* v. *Coro, Inc.*, 97 F. Supp. 185, 186 (S.D.N.Y. 1951) (Kaufman, *J.*). There is obviously no such agreement in the present case. The essential element of champerty and maintenance is the malicious or officious fomenting of litigation, an element which is wholly absent from the proposed settlement. *See, e.g., NAACP* v. *Button*, 371 U.S. 415, 439-40 (1963); *Chester H. Roth, Inc.* v. *Esquire, Inc.*, 186 F.2d 11, 15 (2d Cir.), *cert. denied*, 341 U.S. 921 (1951); 14 Am. Jur. 2d, *Champerty and Maintenance* §§ 1-3 (1964). In light of this well understood meaning of champerty, Andersen's charge that the proposed settlement is champertous is irresponsible.*

Finally, Andersen flings at the proposed settlement the highly charged epithets "collusive", "reprehensible", "taint", and " 'sweetheart' settlement" (Andersen Br. 19, 21). There is no factual basis for these epithets. When the District Court has held its hearing on the proposed settlement, the record will amply demonstrate that, far from being "collusive", the proposed settlement is fair and reasonable in light of the prospects of success of the plaintiff class against the Settling Defendants.

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* The same is true of Andersen's suggestion that the proposed settlement violates the Code of Professional Responsibility. The provisions of the Code of Professional Responsibility upon which Andersen relies (Andersen Br. 17), as well as *Matter of Gilman*, 251 N.Y. 265, 269-70, 167 N.E. 437, 439-40 (1929) (Andersen Br. 18), prohibit the payment of a party's litigation expenses *by his attorney*, not the making of a partial settlement which may assist another party to defray his litigation expenses.

POINT III

The Proposed Settlement Properly Relieves the Settling Defendants of the Expense and Burden of Further Litigation.

In negotiating the proposed settlement, it was of great importance to the Settling Defendants that the settlement terminate the litigation as to them, and that they not be drawn back into the litigation through claims by the Non-Settling Defendants for indemnity, contribution, or other similar relief. Accordingly, the proposed settlement provides that the Non-Settling Defendants will be released from the claims of the plaintiff class to the extent of any claims adjudicated against the Settling Defendants in favor of the Non-Settling Defendants, and that the Settling Defendants will be indemnified for the expenses of defending any such claim (*see* p. 5 *supra*). Cornfeld's brief argues that these provisions are against public policy (Cornfeld Br. 50-52).

The fact is that such provisions are not novel, and have been included in other class action settlements which have been approved by the courts.* Few defendants will enter into settlements if they face the danger of being forced

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* For example, the partial settlement approved on April 30, 1973 in *Gould* v. *American-Hawaiian S.S. Co.*, D. Del., Civil Action No. 3707/3722, not only indemnified the settling defendants against claims by the non-settling defendants, but also required the attorneys for the plaintiff class, Harold E. Kohn, Esq. and Aaron M. Fine, Esq., to defend the settling defendants against such claims, which they have successfully done. *See Gould* v. *American-Hawaiian S.S. Co.*, 387 F. Supp. 163 (D. Del. 1974).

Provisions indemnifying or otherwise protecting the settling defendants against claims by the non-settling defendants were likewise included in the partial settlements approved by the courts in the Seeburg-Commonwealth United litigation, *see* Stipulation of Settlement dated May 26, 1972 and approved November 29, 1972, §§ 6.1,

right back into the litigation by way of third-party claims. The courts have recognized the importance of avoiding this danger by provisions protecting the parties to the settlement against such claims. *See, e.g., Bok* v. *Ackerman*, 309 F. Supp. 710, 712-13 (E.D. Pa. 1970).

Cornfeld argues that the proposed settlement derogates from the right of contribution recognized in *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd on opinion below*, 422 F.2d 1346 (2d Cir.), *cert. denied sub nom. Law Research Service, Inc.* v. *Blair & Co.*, 404 U.S. 941 (1971) (Cornfeld Br. 51). But the proposed settlement, far from diminishing any right of contribution which Cornfeld may have, effectuates such right by releasing Cornfeld from the claims of the plaintiff class to the extent of any such right of contribution.* Thus Cornfeld's attack upon the indemnification provisions of the proposed settlement is without merit as a matter of law.

6.2, *Land* v. *Commonwealth United Corp.*, S.D.N.Y., 69 Civ. 3726; in the National Student Marketing litigation, *see* Stipulation and Agreement of Compromise and Settlement dated April 18, 1974 and approved June 25, 1974, par. 2, *In re National Student Marketing Litigation*, D.D.C., M.D.L. Dkt. No. 105; and in other cases. *See* Stipulation as to Compromise and Dismissal approved February 8, 1974, par. 8, *Wurzburger, Morrow & Keough, Inc.* v. *The Keystone Co. of Boston, Inc.*, S.D.N.Y., 73 Civ. 972 (MP); Stipulation and Agreement of Compromise and Settlement dated February 26, 1971 and approved June 16, 1972, pars. 2, 6, 7, *Lyons* v. *Marrud, Inc.*, S.D.N.Y., 66 Civ. 415 (DNE).

* Moreover, the weight of authority is that under the Federal rule a non-settling defendant has no right to contribution against a settling defendant. *See, e.g., Gomes* v. *Brodhurst*, 394 F.2d 465, 468 (3d Cir. 1968); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969). *But cf. Altman* v. *Liberty Equities Corp.*, 54 F.R.D. 620, 625 (S.D.N.Y. 1972); *Wainwright* v. *Kraftco Corp.*, 53 F.R.D. 78, 80-84 (N.D. Ga. 1971); *Muth* v. *Dechert, Price & Rhoads*, CCH Fed. Sec. L. Rep. ¶ 95,030, at 97,602-97,603 (E.D. Pa. 1975).

Under New York law it is clear, as a result of the 1974 amendments to Section 15-108 of the New York General Obligations Law,

POINT IV

The District Court Properly Directed That Notice Be Given in the English Language.

Cornfeld attacks the District Court's order on the ground that it directed the giving of notice of the proposed settlement in English rather than in various foreign languages (Cornfeld Br. 31-32). The District Court's decision in this respect was a reasonable one in light of the fact, apparently conceded by Cornfeld himself (*see* Cornfeld Br. 32), that the giving of notice in various foreign languages would be a difficult, costly, and impracticable undertaking.

The purchasers in the September 1969 offerings were for the most part institutions and other knowledgeable investors who are able to read English. English is the language of the international financial community, and any information published in that language will be disseminated through investment advisors and others to interested persons. Finally, any class member who cannot read English will be alerted by the word "Court" (which is printed in bold-faced Gothic letters at the top of the first page of the notice (*see* 287A)), as well as by the words "I.O.S., Ltd." (which appear in the heading immediately below the caption on the first page), that the

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L. 1974, c. 742, § 3, that a non-settling defendant has no right to contribution against a settling defendant. These amendments were recommended by the New York State Judicial Conference "to remove the disincentive to settle which presently exists under *Dole* for a tortfeasor because he remains subject to contribution to other tortfeasors against whom a judgment in favor of the injured party may be rendered." Cahill-Parsons New York Civil Practice 11 (1974 Supp.). *Compare Alexander & Baldwin, Inc.* v. *Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 239-40 (S.D.N.Y. 1974) (applying former New York law).

notice is a court document affecting his rights as a purchaser of IOS common shares, which he should have translated or explained for him by someone who can read English. Under these circumstances, the giving of notice in English fully satisfies the requirements of due process. *Cf., e.g., Carmona* v. *Sheffield,* 475 F.2d 738, 739 (9th Cir. 1973) (upholding notice to Spanish-speaking persons in English); *Guerrero* v. *Carleson,* 9 Cal. 3d 810, 812-13, 512 P.2d 833, 835-36, 109 Cal. Rptr. 201, 203-04 (1973) (same).

CONCLUSION

For the reasons given above, the Settling Defendants respectfully submit that the attacks made by defendants-appellants Arthur Andersen & Co. and Bernard Cornfeld upon the Stipulation of Settlement dated June 28, 1974 should be rejected by this Court.

Dated: New York, New York
April 21, 1975

Respectfully submitted,

MARVIN SCHWARTZ
THOMAS A. GRANT
KENNETH M. BIALO
Of Counsel

SULLIVAN & CROMWELL
48 Wall Street
New York, New York 10005
952-8276
Attorneys for Defendants Lexerd & Co., Inc. (formerly known as Drexel Harriman Ripley and Drexel Firestone, Inc.), Hill Samuel & Co., Limited, Guinness Mahon & Co., Limited, and Pierson, Heldring & Pierson

HENRY L. KING
GUY MILLER STRUVE
RHEA KEMBLE NEUGARTEN
OGDEN N. LEWIS
Of Counsel

DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005
HA 2-3400
Attorneys for Defendants Banque Rothschild and Smith, Barney & Co. Incorporated

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HOWARD BERSCH, Plaintiff-Appellee, -against- DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE ROTHSCHILD, HILL SAMUEL & CO., LIMITED, GUINNESS MAHON & CO., LIMITED, PIERSON, HELDRING & PIERSON, SMITH, BARNEY & CO. INCORPORATED, J. H. CRANG & CO., INVESTORS OVERSEAS BANK LIMITED, and I.O.S., LTD., Defendants, and ARTHUR ANDERSEN & CO. and BERNARD CORNFELD, Defendants-Appellants.	:	Nos. 75-7079, 75-7082 AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Robert D. Darnell, Jr., being duly sworn deposes and says that he is over the age of 21 years and is employed by Davis Polk & Wardwell, attorneys for Defendants Banque Rothschild and Smith, Barney & Co. Incorporated, who have their place of business at No. 1 Chase Manhattan Plaza, Borough of Manhattan, City and County of New York; that on the 21st day of April, 1975, he served two copies of the annexed Brief For The Settling Defendants on:

Silverman & Harnes
75 Rockefeller Plaza
New York, New York 10019

Attorneys for Plaintiff-Appellee

Breed, Abbott & Morgan
One Chase Manhattan Plaza
New York, New York 10005

Attorneys for Appellant in No. 75-7079

Gold, Farrell & Marks
595 Madison Avenue
New York, New York 10022

Attorneys for Appellant in No. 75-7082

Wilkie Farr & Gallagher
One Chase Manhattan Plaza
New York, New York 10005

Attorneys for Defendant J. H. Crang & Co.

Paul, Weiss, Rifkind, Wharton
& Garrison
345 Park Avenue
New York, New York 10022

Attorneys for Defendant Investors Overseas
Bank Limited

299 Park Avenue
New York, New York 10017

Attorneys for Defendant I.O.S., Ltd.

by depositing true copies of same securely enclosed in a postpaid wrapper in a Post Office Box regularly maintained by the United States Postal Service at No. 1 Chase Manhattan Plaza, in the City and County of New York.

Richard A

Sworn to before me this

21st day of April, 1975.

Geraldine G. Geier

GERALDINE G. GEIER
Notary Public, State of New York
No. 41-4502603
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1977